

The Appeals Board has jurisdiction to review findings regarding disputed issues of whether an employee suffered injury by accident on the date alleged, which arose out of and in the course of employee's employment. K.S.A. 44-534a.

On May 5, 1994, claimant was employed by respondent as a clerk at a convenience store. She testified that on that date she was carrying bags of ice from the ice machine to the fountain machine. The bottom fell out of one bag and ice spilled onto the floor. She stepped on the ice, slipped and fell, landing on her buttocks. Claimant had recently returned to work for respondent following back surgery which resulted from a previous injury.

Claimant testified that she reported the accident to her supervisor, Kathleen Kelley, and completed the approximately thirty minutes remaining in her shift. The next day she was not scheduled to work. She worked the following day and the day after that without incident. She had swelling and discomfort which persisted and on May 8, 1994, she called her physician, Dr. Tobias, and indicated that she had fallen at work. The May 10, 1994, office note of Dr. Tobias reflects claimant injured her back at work on May 5, 1994. He describes an accident which occurred by the patient carrying two bags of ice, weighing six (6) pounds each, one bag broke, she stepped on a piece of ice and fell down injuring her back.

Kathleen Kelley, manager of Coastal Mart where claimant worked, testified that on May 5, 1994, at approximately 1:15p.m. to 2:00p.m. she was working in the store stocking cigarettes. She did not witness the accident but heard the sack of ice hit the floor from the next room. She relates coming out and seeing the claimant sweeping up the ice. She admits having a conversation with the claimant at that time but denies claimant described having a fall. The assistant manager, Mary Kendrick, also testified. She likewise was working at the store on May 5, 1994. She also was not in a position to witness the accident but likewise denies claimant ever mentioned an accident or injury.

The store manager admits receiving an accident report from the claimant. The accident of May 5th, was on a Thursday. At various times during her testimony the store manager described receiving the accident report on the following Saturday, Sunday, or Monday, May 7th, 8th, or 9th.

Both the manager, Kathleen Kelley, and the assistant manager, Mary Kendrick, speculate that the claimant's alleged injury did not occur but rather is an attempt by the claimant to keep from having to work nights as scheduled.

Based upon the record taken as a whole, and in particular the corroborating medical history, the Appeals Board finds that more probably than not, claimant did sustain personal injury by accident arising out of and in the course of her employment on the date alleged.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the November 28, 1994 Order of Administrative Law Judge George R. Robertson should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of February, 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

cc: Chris A. Clements, Wichita, KS
Jerry M. Ward, Great Bend, KS
David G. Shriver, McPherson, KS
George R. Robertson, Administrative Law Judge
George Gomez, Director